IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

GREAT LAKES AIRLINES, INC., CENTRAL AIR TRANSPORT, INC., CURREY AIR TRANSPORT LIMITED, TRANS ALASKAN AIRLINES, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 24, 1961.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals is printed in Appendix B hereto, page 6a, and has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1961. Rehearing was denied on March 21, 1961. This petition is filed within 90 days from the date of the order of the Court below. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Section 1006(f) of the Federal Aviation Act of 1958, 49 U.S.C., Section 1486 (f).

QUESTIONS PRESENTED

1. Does an irregular and supplemental air carrier hold a license under Section 2(e) of the Administrative Procedure Act which is protected by Section 9(b) of that Act providing, (1) for prior notice to a licensee and specific charges of facts or conduct warranting the termination of that license, and (2) an opportunity to demonstrate or achieve compliance, where such carrier has been operating for many years under permission of the Civil Aeronautics Board and has invested large sums of money relying on that permission?

2. Where the Board in a rule-making proceeding modifies an existing type of air service which a large number of carriers were authorized to operate, may it go further and in the same proceeding without notice or opportunity to achieve compliance, find many of those carriers disqualified to operate the modified service and terminate their former licenses on the basis of past violations of the Federal Aviation Act where no specific charges were given to the licensees other than general information that the qualifications of all carriers and their past conduct would be considered at the hearing?

3. When (in the rule-making proceeding described above) the Examiner's decision following the close of

the hearing gave the existing licensees the first notice of what provisions of law they were charged with violating and found that such violations had occurred, did the Board deprive the existing license holders of due process of law when it refused to reopen the hearing to permit them to submit evidence in rebuttal to the findings of violations?

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act, the Federal Aviation Act, and Public Law 86-661 here involved are set forth in Appendix A, p. 1a, to this petition.

STATEMENT OF THE CASE

Your petitioners are four supplemental air carriers. They have been in business continuously for over sixteen years. Their annual revenues are as follows:

	1959	Nine months ended September 30, 1960
Great Lakes Airlines, Inc.	$7,726,133.58	$2,392,920.82
Currey Air Transport Limited	1,101,816.79	2,784,259.84
Trans Alaskan Airlines, Inc.	666,071.90	3,184,501.99
Central Air Transport, Inc.	540,904.29	368,418.26

The total assets of petitioners as of September 30, 1960, were: Great Lakes — $970,822.14; Currey — $865,932.59; Trans Alaskan—$598,254.15; and Central $95,564.69. These assets are practically all equipment which can only be economically utilized in air transportation.

We have not computed the going concern value but it is obvious from the above figures that it amounts to several millions of dollars over and above the second-

hand value of the equipment which must be immediately sold if the Court of Appeals decision stands.

Petitioners and other carriers entered the air transport field fifteen years ago. At that time, the Civil Aeronautics Board had in effect a regulation which permitted "nonscheduled" operations. Petitioners began their operations under that regulation and, in reliance thereon, made substantial investments in their businesses. Petitioners contend that at this point in time they acquired "licenses" within the meaning of Section 2(e) of the Administrative Procedure Act. Thereafter, the Board designated petitioners as Large Irregular Carriers and issued to them Letters of Registration. The Letters of Registration continued the same operating authority as had been authorized under the prior regulation.

In September, 1951, after petitioners and others had been in business for over five years operating pursuant to authority of the Board, the Board instituted a rule-making proceeding to obtain further information with respect to "irregular" operations and specifically set for hearing the following issues:

(1) Is there a need for such services;

(2) If so, what type of services are required;

(3) What would be the effect of such services;

(4) Is the Board empowered to authorize limited-type services;

(5) Should such services be authorized by exemption or certificates;

(6) What conditions should be imposed by the Board;

(7) Should the service be performed by carriers already exempted or by carriers yet to be exempted. (R. 1A)

Hearings were held before two examiners (sitting jointly). After fifteen months of hearing, the Board directed the examiners to suspend the hearings and to issue an initial decision on the general public interest question of the role, if any, to be assigned to the irregular carriers as a class without regard to the issue of the qualifications of any of the carriers. (R. 61A)

The Board issued its opinion and order in 1955, finding, *inter alia*, that the irregular carriers' operations had been and would continue to be in the public interest, that the carriers should be redesignated as supplemental air carriers, and that their operating authority should be modified.[1] (R. 573A) The Board referred to the modification as an "enlarged authorization." The Board at this time granted an exemption to each carrier to operate within the scope of the new operating authority, and issued such exemption to each of the petitioners. (R. 639A)

In this same order, the Board included in its opinion a further direction—which raises the issues presented to this Court. The Board directed that the hearings resume on the issues of (a) what type of authority (exemption or certificate) should be issued to the carriers, and (b) the identity of the carriers to receive the enlarged authority. (R. 573A)

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[1] Until that time the carriers could operate an unlimited number of charter and individually-ticketed trips between any two points on an "irregular" or "infrequent" basis. Under the new authority, the carriers can operate only ten individually-ticketed flights but an unlimited number of charter trips without regard to "regularity."

Hearings before the examiners were resumed to receive evidence with respect to the two issues. Neither at this time nor at any other time prior to the close of the hearing were any of the carriers apprised of any allegation that any of them had violated any particular section of the Federal Aviation Act or any particular regulation, and, of course, they were never afforded any opportunity to achieve compliance.

The only notice petitioners had that evidence of violations would be considered was contained in a Board order issued before the hearing commenced. This order recited that,

> "evidence of violations of law or regulations by an applicant is relevant in a proceeding on an application for operating authority"

and, further,

> "any applicant against which evidence of violations is produced may be assured that we [the Board] will be receptive of any showing that it may make which will indicate that under all the circumstances, we should accord little or no weight to the evidence of violations, or that there are overbalancing considerations of public interest." (R. 19A-20A)

At the end of the hearing the examiners issued an initial decision in which they found petitioners had violated certain specific provisions of the Federal Aviation Act.[2] The evidence upon which the examiners

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[2] Central was found to have violated Section 408 of the Act; Great Lakes was found to have violated Sections 401(a), 403(b), 408(a), 412(a), and 1005(e); Currey to have violated Sections 401(a), 403(b), and 412(a); and Trans-Alaskan to have violated Sections 408(a) and 412(a). These sections of the Act deal with the operations of flights, the lease of aircraft, control relationships, and contracts with other carriers. No issue of safety was involved

based their findings of violations was relevant to the issues in the proceeding relating to the carriers' methods of operating, the type of service required, the effect of the carriers' service, and the conditions, if any, which should be imposed by the Board on the service to be authorized. When that evidence was introduced, petitioners had no way of knowing whether it was directed toward issues relating to future operations or to the past. Petitioners had no reason to believe that the examiners would sift through that evidence to discover possible violations without giving petitioners notice of their intention and an opportunity to be heard or to rebut specific charges.

The examiners' initial decision was the first notice of any specific charges given to petitioners. Apparently, the Board believed that Section 9(b) of the Administrative Procedure Act did not apply to the Board, because it said in its order denying reconsideration:

> "We find no reason to reconsider our determination that notice of specific violations was not required." (R. 1348A)

The violations which the examiners found had all occurred more than five years before the Board's decision.[3] The record disclosed no violations subsequent to that five-year period.[4] Nevertheless, the Board found that these long-past violations of certain sections of the Act were a sufficient basis for the conclusion that

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[3] The Trans-Alaskan case was not heard until 1956.

[4] This was clearly true as to Central. The only possible existing violation which could have been charged against any of the other petitioners (all corporations) is the purely technical one that an unapproved control relationship was continuing to exist.

the petitioners were not qualified to render the modified type of service which the Board authorized for supplemental air carriers.

Petitioners then requested the Board to reopen the case to permit petitioners to rebut the charges now leveled against them for the first time. (R. 1498A; 1506A) The Board refused to permit them to present evidence in rebuttal. This was deliberate action.

While there was a reopening of the record, this was severely limited to changes in qualifications which occurred after the dates of the alleged violations, and no opportunity was afforded to explain or submit evidence with respect to those violations on which the Board ultimately based its conclusions. (R. 864A; 1496A)

Then, the Board went further. Having found the petitioners unqualified for the newly-modified authority, the Board terminated all licenses held by petitioners.

Petitioners sought review of the Board's action in the United States Court of Appeals for the District of Columbia Circuit. That Court, by a 2-1 vote, affirmed. Judge Fahy dissented on the ground that petitioners' licenses had not been terminated in a valid manner for lack of notice, refusal to reopen the record, and failure to comply with the revocation requirements of the Administrative Procedure Act and due process of law. That Court also denied petitioners' request for rehearing *en banc*.

Petitioners, believing that the Board deprived them of licenses contrary to the Administrative Procedure

Act, and believing that the Board deprived them of due process of law, seek review by this Court.

REASONS FOR GRANTING THE WRIT

1. The issues raised by the majority opinion below have far-reaching implications. They affect every sort of license or permit of indefinite duration. Large sums of money invested in such permits may be forfeited by a finding that the stockholders or officers of the licensee have acted unlawfully without giving them notice of the charges which are ultimately determined against them. When the licensee first gets notice of the offenses with which he is charged, he is not allowed to reopen the hearing and explain his conduct. This is true even though the alleged offenses were committed many years ago, and the record shows that, at the time of the hearing, no licensee was in violation of any provision of the law.[5]

It is a basic proposition that once a going business has been established on the basis of a license or Government permission, property rights attach. This means that such a license may not be revoked, nor its renewal denied, without both procedural and substantive due process of law. Yet, the Court below would sanction a procedure whereby the authority to do business is summarily taken away and basic property rights destroyed without opportunity for full hearing.

While these petitioners are air carriers, the underlying constitutional statutory constructions are applicable to holders of all licenses of indefinite duration, including the right to operate air service, television

[5] Cf. footnote 4, p. 7, *supra*.

and radio stations, and licenses issued by the Interstate Commerce Commission.

The means by which agencies may revoke licenses were sharply limited by the Administrative Procedure Act. But, here, a new and different means is introduced to hack away at the safeguards of the Act. If the 2-to-1 decision of the Court below is allowed to stand, Section 9(b) of the Administrative Procedure Act is no longer any guaranty to licensees against the confiscation of their property by agency action.

Section 9(b) of the Administrative Procedure Act was deliberately worded to protect licensees and to prevent the very result which two judges of the Court below would now sanction. As Congressman Walter explained,[6]

> "Section 9(b) . . . prohibits [agencies] from withdrawing a license without first giving the licensee notice and an opportunity to achieve compliance . . . . These special provisions are necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies . . . . The purpose of this section is to remove the threat of disastrous, arbitrary and irremediable administrative action."

Under the decision of the Court below, an agency may completely ignore Section 9(b) of the Administrative Procedure Act by slightly modifying the type of authority in a rule-making proceeding, finding a licensee unqualified for the new type authority, and thereupon cancelling the existing license and imposing an economic death sentence on the licensee.

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[6] Congressional Record, May 24, 1946, p. 5759.

We believe the importance of this question requires a writ of certiorari.

2. The decision of the Court below is contrary to the reasoning of this Court in the case of *Pan-Atlantic Steamship Corporation* v. *Atlantic Coast Line Railroad*, 353 U.S. 476, 77 S. Ct. 999 (1957). Section 9(b) of the Administrative Procedure Act provides in pertinent part:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

The term "license" as used in the above section is defined by Section 2(c) of the Administrative Procedure Act as follows:

> "'License' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission . . . ."

Petitioners have been operating for years pursuant to "Letters of Registration" and "temporary exemptions." These were the instruments of authorization issued by the Board which authorized non-scheduled carriers to provide an irregular service. These were issued long before the instant proceeding was instituted by the Board.

At the time these exemptions were issued, there was no requirement that the licensee should file an application for any more permanent type authority.[7] It would appear from the language of Section 2(e) that these "letters" and "exemptions" were certainly some "form of permission" and therefore, "licenses." Accordingly, it seems impossible to say that Section 9(b does not apply.

The majority opinion of the Court of Appeals reaches the contrary result by quoting a single line of legislative history and finding that the licenses were temporary, and not protected by Section 9(b). This conclusion is directly contrary to the decision of this Court in *Pan-Atlantic Steamship Corporation* v. *Atlantic Coast Line Railroad*, 353 U.S. 436, 77 S. Ct. 999 (1957). That case involved an authorization which was clearly temporary. Yet, this Court held that Section 9(b) was applicable to the authorization, whereas two judges of the Court below hold that the section does not apply to licenses of a continuing nature.

In the *Pan-Atlantic* case, the Interstate Commerce Commission had issued Pan-Atlantic "temporary authority to operate as a common carrier by water between various ports of the United States for a period of 180 days." (353 U.S. at 438, 77 S. Ct. at 1001) The Commission then began a hearing which was clearly an "original licensing proceeding" to determine whether Pan-Atlantic should have regular authority to operate as a common carrier by water. This hear-

[7] Under the decision of the Court of Appeals (*United Air Lines, Inc.* v. *CAB*, 108 App. D.C. 1, 278 F. 2d 446 (1961), *judgment vacated and cause remanded*, —— U.S. ——, 5 L. Ed. 2d 89), the Board could not issue certificates for such authority.

ing was, however, not concluded before the expiration of Pan-Atlantic's 180-day authorization. Therefore, the Interstate Commerce Commission authorized Pan-Atlantic to continue to operate as a common carrier by water until further order of the Commission. Seven railroads brought suit to set aside this order authorizing an extension of the 180-day authorization.

The Interstate Commerce Commission had acted under the last sentence of Section 9(b)[8], and this Court held that it was justified in doing so. This Court, speaking through Mr. Justice Douglas, said (353 U.S. at 438-440, 77 S. Ct. 1002):

> "'License' as used in the Administrative Procedure Act includes 'the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.' Section 2(e). A temporary authority granted under Section 311(a) of the Interstate Commerce Act would seem to be a 'permit' or 'certificate' under the Administrative Procedure Act. 'Licensee,' as used in the sentence of Section 9(b) which we have quoted, would seem, therefore, *to include one who holds a temporary permit under Section 311(a)*. It is argued that 'license' in that section includes *only those that are permanent*. But we see no justification for that narrow reading. A permit for 180 days covers an 'activity of a continuing nature.'
>
> "Section 9(b) of the Administrative Procedure Act is a direction to the various agencies. By its

[8] "In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

terms there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined.

"Each of these conditions is satisfied in the present case; and we see no reason why the provisions of this later Act may not be invoked to protect a person with a license *from the damage he would suffer by being compelled to discontinue a business of a continuing nature*, only to start it anew after the administrative hearing is concluded. That has been the Commission's consistent construction of the law;[2] and we think it is the correct one. Section 9(b) of the Administrative Procedure Act contains a new rule that supplements the prior authority granted by Section 311(a) of the Interstate Commerce Act. Initially, the Commission can do no more than issue a temporary authority good for 180 days. But once the conditions of Section 9(b) are satisfied, an extension in the interests of economy and efficiency is authorized." (Emphasis added)

"[2] See 13 Fed. Reg. 4150 for the rules of the Commission governing these extensions."

If, as this Court has held, the word "license" in the last sentence of Section 9(b) includes a temporary license, then the same word in the second sentence of the same section must also include a temporary license. No reasonable comparison of the language of the two sentences can lead to any other conclusion.

3. The decision of the majority of the Court below is erroneous. The two-member majority of the Court below erred in their decision. This error stems from their willingness to hold that any license labeled as

temporary is not subject to the Administrative Procedure Act. The majority clearly finds that the original license was issued pursuant to a regulation issued in 1946 under the caption "Temporary exemption of nonscheduled operations from certain provisions of Title IV of the Civil Aeronautics Act of 1938, as amended." After the carriers had engaged in business for five long years under these licenses, the Board instituted a proceeding. The majority calls this "an original licensing proceeding." From this, the majority concludes that Section 9(b) of the Administrative Procedure Act does not apply to the cancellation of individual licenses acquired five years before the proceeding was ever instituted. Even if there were a cancellation of licenses within the meaning of Section 9(b), says the majority, the licenses were temporary and did not come within the purview of that section.

In reaching this construction of the statute, the majority cites a single piece of legislative history to the effect that Section 9(b) does not apply to "temporary licenses which may be issued pending the determination of applications for licenses." But, this has no relevance to the instant case because petitioners' original licenses were issued in 1946, and there were no "pending applications" then before the Board. The majority made no reference to this important fact.

As Judge Fahy said in his dissenting opinion, "By whatever name their operating authority may be called, the fact is that petitioners since 1946 have been operating as large irregular carriers with the permission and under the authority of the Board. Accordingly, they were licensees as the term 'license' is defined in Section 2(e) of the Administrative Procedure Act."

Once those licenses were acquired, they were protected by both the due process clause and the Administrative Procedure Act. Apparently the majority below does not deny this proposition, but, instead, seeks to evade it. First, they take refuge in the unquestionably erroneous conclusion that the licenses were "temporary" rather than of indefinite duration. Section 9(b) of the Administrative Procedure Act cannot be so thwarted. That section applies to licenses issued, as petitioners' were issued, without any requirement for an application for such a license. The majority of the Court below seem to rely heavily on the Board's use of the word "temporary" when it issued the licenses in 1946. This is palpable error. All exemptions are temporary in the limited sense that they can be terminated by the Board, provided the Board complies with Section 9(b).

The majority err further when they say "no sanctions were imposed as a result of the findings" of violations. According to the majority an economic death sentence is not a sanction. It would be difficult to conceive of a more punitive sanction than the revocation of a company's license to do business. And, this sanction was imposed in this case by an order terminating the license which, in turn, was based on findings of specific violations of the Federal Aviation Act.

No specification of those violations was ever given to petitioners until the examiners' Initial Decision was issued, and then, petitioners' requests to reopen the record to introduce rebuttal evidence were denied. If such procedure is permitted to stand no licensee is safe from arbitrary administrative action.

4. Petitioners were deprived of due process of law when their requests to reopen the record and to submit rebuttal evidence were denied. On this issue Judge Fahy said in his dissent:

> "And as to due process, I reach the same conclusion as with respect to section 9(b); that is, the hearing should in any event have been reopened when requested after the specific violations set forth as a possible basis for revocation were first made known by the examiners' decision."

We wish to add that according to the majority opinion petitioners are not being tried for their past violations. These alleged violations are used as evidence that petitioners' stockholders and officers cannot be trusted to comply in the future. Such a moral judgment involves such vague and subjective considerations that it is particularly important to grant petitioners every opportunity to reopen their case and explain their past conduct. Not to do so denies them due process.

We further doubt that there is substantial evidence in this case of moral culpability sufficient to drive petitioners out of business. It must be remembered that the offenses found were committed many years before, and at a time when the validity of the regulation allegedly violated was far from clear. Any decision to bar an individual from continuing a business licensed by the government should require stronger evidence than we have here. This is not a comparative hearing in which only one out of many applicants can be granted a license. In such cases the Commission is forced to determine which of the applicants gives the greater expectation of rendering the best public service. In such hearings the associations and past

conduct of all the applicants must be given weight in making the selection. But a decision denying an applicant one type of license does not bar him from holding another license. It is not an absolute disqualification. It is not even a reflection on his character.

In this case there was no reason or public necessity why all the applicants for the new service could not continue their businesses. But the decision absolutely disqualified petitioners from continuing in transportation on moral grounds.[9]

The burden of proof to support the accusation of bad character on the part of petitioners' officers and stockholders must surely be on the government. Certainly such a serious charge should not be tried in a rule-making hearing. It is unthinkable that rule-making hearings can be used as a vehicle to try the character of individuals or their tendencies to flout the law. Yet the Court below has treated the issue of moral character as one in which the burden of proof is on the petitioners and at the same time denies the petitioners an opportunity for rebuttal after the examiners for the first time accused them of violating the Federal Aviation Act.

5. The decision below is contrary to the policy of Congress, as expressed in Public Law 86-661, Act of

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[9] In July, 1960, petitioners Great Lakes, Currey and Trans-Alaskan, filed applications with the Board for certificates to engage in scheduled supplemental air transportation. These applications were dismissed by the Board without granting said petitioners a hearing on the ground that they had already been found unqualified in the instant proceeding. Board Order No. E-16050, adopted November 22, 1960. Petitioners Great Lakes, Currey and Trans-Alaskan, have sought review of that Order before the Court of Appeals in Case No. 16,165, now pending.

July 14, 1960, 74 Stat. 527. A second decision in the Supreme Court of the United States decided October 24, 1960, throws doubt on the conclusions of the majority in the Court of Appeals. The Board decided to certificate those carriers which qualified for certification under its views. The Court of Appeals held that the certificates were not authorized. The Supreme Court granted certiorari and vacated the judgment in the following memorandum opinion:

> "The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86-661 [Act of July 14, 1960, 74 Stat. 527] has expired." 364 U.S. 397 (*United Air Lines, Inc.* v. *CAB*, 364 U.S. 297)

We think it can be clearly inferred that the Supreme Court does not believe that any definitive action on questions involving irregular air carriers should be taken until the Congressional investigation contemplated by Public Law 86-661 has been made by Congress. It can only be for that reason that the Supreme Court did not affirm or reverse the ruling of the Court of Appeals in the *United Air Lines* case. It follows that if the Court of Appeals should retain jurisdiction with respect to the *issuance* of the certificates, it should equally retain jurisdiction with respect to the cancellation of licenses. The issuance of certificates can be corrected by later decisions. The destruction of existing supplemental air carriers is irreparable.

CONCLUSION

For the above reasons, and because the majority opinion of the Court below will have widespread consequences with respect to all holders of Government licenses of indefinite duration, we respectfully urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: April 21, 1961

APPENDICES

APPENDIX A

Pertinent Statutes

28 U.S.C.A. Section 1254 (1). Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. Sec. 1301 *et seq:*

Sec. 401(a) No carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * *

Sec. 416(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

* * *

Sec. 1006. (f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq:*

Sec. 2(c) LICENSES AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revo-

• • •

Sec. 9(b) LICENSES.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

• • •

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. E

any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provisions shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Public Law 86-661
86th Congress, H. R. 7593
July 14, 1960

AN ACT

To provide that the Civil Aeronautics Board may temporarily authorize certain air carriers to engage in supplemental air transportation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Civil Aeronautics Board (hereafter in this Act referred to as the "Board") is empowered—

(1) to validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

SEC. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board—

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certificate of public convenience and necessity issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, or against the holder of any operating authority conferred under Board Order E-9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the con-

ferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E-9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point.

Approved July 14, 1960

Judgment

These cases came on to be heard from the Civil Aeronautics Board, and were argued by counsel.

On consideration hereof, it is ordered and adjudged by this court that the order of the Civil Aeronautics Board on review in these cases is affirmed insofar as it applies to petitioners in Nos. 15,015 and 15,026, and it is vacated insofar as it applies to petitioner Air Cargo Express, Inc., in No. 15,042.

It is further ordered by the court that for the reasons indicated in the opinion of the court this day filed herein the petitions for review in Nos. 15,039 and 15,041 are hereby dismissed.

PER CIRCUIT JUDGE PRETTYMAN

Dated February 24, 1961

Separate opinion by Circuit Judge Fahy concurring in part and dissenting in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15015

GREAT LAKES AIRLINES, INC., ET AL., *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

COMMON CARRIER RAILROADS, *Intervenor*
TRANS WORLD AIRLINES, INC., *Intervenor*
UNITED AIR LINES, INC., *Intervenor*

No. 15026

CENTRAL AIR TRANSPORT, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

UNITED AIR LINES, INC., *Intervenor*
TRANS WORLD AIRLINES, INC., *Intervenor*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL., COMMON CARRIER RAILROADS, *Intervenors*

No. 15039

AIR TRANSPORT ASSOCIATES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

TRANS WORLD AIRLINES, INC., *Intervenor*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL., *Intervenors*

No. 15041

CONTINENTAL CHARTERS, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

TRANS WORLD AIRLINES, INC., *Intervenor*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Intervenors*

No. 15042

AIR CARGO EXPRESS, INC., a Corporation, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

TRANS WORLD AIRLINES, INC., *Intervenor*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Intervenors*

On Petitions for Review of Orders of the Civil Aeronautics Board

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Decided February 24, 1961

Mr. Charles Older, with whom *Mr. Dayton M. Harrington* was on the brief for petitioners in No. 15015. *Mr. Richard H. Keatinge* also entered an appearance for petitioners in No. 15015.

Mr. Albert F. Beitel for petitioner in No. 15026. *Mr. David A. Fegan* was on the brief for petitioner in No. 15026.

Mr. Warren E. Miller for petitioner in No. 15042.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner*, Deputy General Counsel, Civil Aeronautics Board, *Messrs. Robert L. Toomey* and *James E. Nathanson*, Attorneys, Civil Aeronautics Board, and *Messrs. Robert A. Bicks* and *Richard A. Solomon*, Attorneys, Department of Justice, were on the brief, for respondent.

Messrs. Howard C. Westwood, William H. Allen, Robert L. Stern, William M. Dickson, and *James K. Crimmins* were on the brief for intervenors. *Mr. J. D. Feeney* also entered an appearance for intervenor Common Carrier Railroads and intervenor The Atchison, Topeka and Santa Fe Railway Company, et al. *Mr. James Francis Reilly* also entered an appearance for intervenor United Air Lines, Inc. *Mr. James D. Simpson* also entered an appearance for intervenor Trans World Airlines, Inc.

Mr. David I. Shapiro entered an appearance for petitioner in No. 15039.

Mr. Ben Ivan Melnicoff entered an appearance for petitioner in No. 15041.

Before WILBUR K. MILLER, Chief Judge, and PRETTYMAN and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge*: Petitioners in these cases are unsuccessful applicants for final authority to perform supplemental air service. Their applications were denied by the Civil Aeronautics Board in Order No. E-13436 on January 28, 1959.[1] The Board found that during the period when these carriers were operating under interim exemptions they had violated provisions of the Civil Aeronautics Act and the Board's regulations and had thus exhibited a lack of "compliance disposition" which disqualified them for final authority as supplemental car-

[1] Rehearing was denied in Order No. E-14449 (Sept. 15, 1959

riers.[2] By the terms of the order the interim exemption authority under which petitioners had previously been operating was to terminate sixty days after the effective date of the order.

In petitioning this court for review of the Board's order these carriers make the following contentions:

1. Petitioners were not found unqualified for their existing exemption authority; and because this authority constituted a "license" within the meaning of Section 2(e) of the Administrative Procedure Act[3] the Board erred in cancelling it without bringing a proceeding for that purpose in accordance with Section 9(b) of that Act.[4]

2. The Board's procedure was defective because the question of past violations was not in issue and the applicant-carriers had no notice that this question would be tried and determined in this proceeding.

3. The Board violated Section 9(b) of the Administrative Procedure Act by terminating petitioners' domestic operating authority before passing upon the foreign and overseas aspects of the applications.

4. The Board should reconsider its decision as to these petitioners in the light of this court's decision[5] holding

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[2] Petitioner in No. 15042, Air Cargo Express, Inc., was found unqualified as to compliance disposition because it was owned, controlled and managed by a group of persons who had constituted the major part of the management of Air Transport Associates, Inc., a carrier whose operating authority had previously been revoked by the Board for flagrant violations.

[3] 60 STAT. 238 (1946), 5 U.S.C. § 1001(e).

[4] 60 STAT. 242 (1946), 5 U.S.C. § 1008(b).

[5] United Air Lines, Inc. v. Civil Aeronautics Board, 108 U.S. App. D.C. ....., 278 F. 2d 446, *judgment vacated per curiam and case remanded with instructions sub nom.* All American Airways v. United Air Lines, 364 U.S. 297 (1960).

that the Board erred in granting certificates to the qualified applicants.

Additional arguments are made by individual carriers; we will discuss them later and separately.

We think petitioners' contentions, above stated, cannot be sustained and that the Board's order must be affirmed.

This is another phase of a long controversy concerning irregular or nonscheduled air carriers, most of it spelled out in court and Board opinions and rulings.[6] The order here under attack is the culminating order in a long investigation begun in 1951 after a series of lesser efforts over many years to reach a satisfactory conclusion to the problem. In this order the Board made its decision as to the form of the operating authority for these carriers, and its decisions as to the qualifications of the individual applicants. As we have indicated, it found the present petitioners unqualified.

I

Petitioners argue that the operating authority they possessed under an interim exemption was a "license" that could be cancelled only after a compliance proceeding had been brought against them and they had been given an opportunity to conform their conduct to the law. They claim that the Board cancelled these licenses for *nonscheduled* service in the process of denying their applications for the new and different *supplemental* service. This argument fails in several respects.

[6] *E.g.*, United Air Lines, Inc. v. Civil Aeronautics Board, *supra* note 5; American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 905 (1957); Large Irregular Air Carrier Investigation, 22 C.A.B. 838, 853 (1955); Standard Airlines v. Civil Aeronautics Board, 85 U.S. App. D.C. 29, 177 F. 2d 18 (D.C. Cir. 1949); Investigation of Nonscheduled Air Services, 6 C.A.B. 1049 (1946); C.A.B. Reg. 400-1, as amended Dec. 7, 1938, 3 Fed. Reg. 2886.

First, assuming for the purposes of the argument that petitioners did have "licenses", they were temporary or conditional. They were not withdrawn, suspended, revoked or annulled within the meaning of Section 9(b) of the Administrative Procedure Act; they expired, or terminated, by their own terms.

From its inception in 1938 the Board has been concerned with the role of nonscheduled air carriers in national air transportation. Moreover it was aware from the outset that, if nonscheduled service was to become permanent, careful study would be necessary to define the precise limits of the ultimate operating authority. Because it was difficult to determine whether and to what extent such service was needed, and because such service presented a potential threat to scheduled, certificated service, the Board authorized nonscheduled service only on a temporary basis. Every regulation or order issued by the Board in which this service was permitted carefully conditioned the authority. In December, 1938, for example, when the Board first spoke on the question, it issued an exemption for nonscheduled carriers that was to last "[u]ntil the authority shall adopt further rules, regulations or orders with respect to such matter".[7] An amendment to this regulation issued in 1946 bore the caption "Temporary exemption of non-scheduled operations from certain provisions of Title IV of the Civil Aeronautics Act of 1938, as amended."[8] When the Board imposed the requirement for letters of registration, in 1947, it provided that these letters were to expire upon a finding by the Board that enforcement of Section 401 of the Civil Aeronautics Act[9] would be in the public interest and would no longer be an undue burden upon irregular car-

[7] C.A.B. Reg. 400-1, as amended Dec. 7, 1938, 3 Fed. Reg. 2886.

[8] Regs., Serial No. 367, May 17, 1946, 11 Fed. Reg. 6584.

[9] 52 STAT. 987 (1938) (now Federal Aviation Act of 1958, § 401, 72 STAT. 754, 49 U.S.C. § 1371).

riers.[10] In 1949 the Board terminated this "blanket" exemption. In its place it conferred a temporary exemption that was to terminate within thirty days of the effective date of that order unless the carrier filed an application for an individual exemption. If such an application were filed, the temporary exemption would continue "until, but only until," the date specified in the Board's order finally disposing of [the carrier's] application for individual exemption".[11] Petitioners duly filed such applications, and in 1951 these applications were consolidated into the *Large Irregular Air Carrier Investigation*. At that time the Board stated:[12]

> "• • • it should be clearly understood by all parties to the proceeding that the Board considers that the issues in this proceeding include the possibility that at its close the Board may deny the applications of the Large Irregular Carriers and enter such further orders as may be necessary to terminate any operating rights which derive from Part 291 or any amendment thereof. Whether the Board will do so, of course, will depend upon the findings made and conclusions reached upon the basis of the record in the proceeding."

It was not until this investigation was concluded and the order under review here was issued that the Board made any formal findings with respect to the qualifications of individual carriers. Since 1938 the carriers had been operating at the sufferance of the Board, and there was never any guarantee that all of these carriers would be found qualified to perform the service finally defined by the Board. Indeed there was no guarantee during these

[10] Regs., Serial No. 388, May 5, 1947, 12 Fed. Reg. 3076.

[11] Regs., Serial No. ER-142, Apr. 13, 1949, 14 Fed. Reg. 1879.

[12] C.A.B. Order No. E-6017 (Jan. 8, 1952).

years that this type of service would be authorized at all.[13] Thus the proceeding that resulted in the order attacked here was, in a sense, an original licensing proceeding. Our petitioners did not have their licenses revoked as "punishment" for past conduct; they were found unqualified for permanent licenses, because they lacked compliance disposition; and their temporary licenses thereupon expired.

Moreover the legislative history of the Administrative Procedure Act makes clear that Section 9(b) was not intended to apply to temporary licenses. Both the Senate[14] and House[15] Reports contain express statements to this effect. And appended to the Senate Report is a letter from the Attorney General to the Chairman of the Senate Judiciary Committee, containing the following commentary on S. 7, the bill that developed into the Administrative Procedure Act: "The second sentence of subsection (b) [of Section 9] is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses."[16] To the same effect is the Attorney General's Manual on the Administrative Procedure Act, where it is stated (p. 91): "Such permits or licenses may be revoked without 'another chance' and regardless of whether there is willfulness or whether the

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[13] We note that we are not here faced with the question whether in a rule-making proceeding the Board could have revoked *all* prior operating authority for all nonscheduled or supplemental carriers. The *Large Irregular Air Carrier Investigation* had both rule-making and adjudicatory aspects, but petitioners here claim to have been aggrieved only by the latter.

[14] S. Rep. No. 752, 79th Cong., 1st Sess. (1945), *Administrative Procedure Act, Legislative History* 212 (1946) [hereinafter cited *Legis. Hist.*].

[15] H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), *Legis. Hist.* 275.

[16] *Legis. Hist.* 229.

public health, interest, or safety is involved." So, even if the action of the Board could be construed to be a withdrawal, suspension, revocation or annulment, within the meaning of Section 9(b), these petitioners are not aided. It is beyond question that their licenses were temporary.

Petitioners contend that their licenses were cancelled in a proceeding in which applications were being considered for a "new and different type of service". But the fact is the applications consolidated into the *Large Irregular Air Carrier Investigation* were for whatever type of irregular service the Board might finally authorize. The nature of the service was one of the questions to be determined. The Board's decision to discontinue "nonscheduled" service, with its requirement of irregularity, and institute "supplemental" service, limited to ten round trips per month between any two points, was made in Order No. E-9744, November 15, 1955. When that decision was reviewed here, we expressly accepted the Board's conclusion with respect to supplemental service.[17] Our remand in that case related only to the Board's decision to issue interim exemptionns. Thus "supplemental" service has been authorized since 1956. The order here under review merely decided which carriers are qualified for that service and what the form of the operating authority would be. At no time did the Board indicate that different qualifications would be required to perform the "different" types of service, *i.e.*, "supplemental" as against "nonscheduled". Petitioners' claim that their "licenses" for nonscheduled service were cancelled when they were found unqualified for supplemental service is without merit.

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[17] American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (1956), *cert. denied*, 353 U.S. 905 (1957).

II

Petitioners say the Board failed to charge specific violations of the Act and regulations and failed to give notice that the issue of violations would be "tried and determined" in this proceeding. Because the findings of specific violations gave rise to the inference that these carriers lacked "compliance disposition", the procedure, they claim, was fatally defective.

As we have pointed out, this proceeding was essentially a licensing proceeding. It was not a compliance proceeding. The qualifications of the applicants constituted the ultimate question to be determined, and evidence bearing on this question was to be adduced at the hearing. In such a case we think the Board could not be required to give advance notice of specific disqualifying conduct. The burden is on the applicant to show qualification. Furthermore the record clearly refutes petitioners' contention that they had no notice that violations would be a subject of proof. By ER-142, April 13, 1949, the Board amended Section 292.1 of the Economic Regulations. In that order, which terminated the prior blanket exemptions, it was expressly stated that: "One of the factors which the Board would take into consideration in disposing of such applications is the extent to which the applicant had engaged in regular operations and had otherwise failed to comply with the requirements of the act and the Board's regulations."

In 1952, after these individual applications had been consolidated into the newly instituted *Large Irregular Air Carrier Investigation*, the Board stated in an order[18] disposing of miscellaneous motions and petitions relating to the investigation:

"* * * A number of applicants move that the Board direct the Examiner to exclude from the pro-

[18] Order No. E-6017 (Jan. 8, 1952).

ceeding any evidence with respect to violations prior to September 21, 1951, the date of the Board's order of investigation herein.

"Under the Board's decisions in the past and under court decisions, evidence of violations of law or regulations by an applicant is relevant in a proceeding on an application for operating authority. Such evidence, when received, does not necessarily set up a bar to grant of an application, but is to be weighed and considered by the regulatory agency in the light of all the circumstances. * * *

"* * * Evidence of past violations will be only one factor to be considered and the receipt of such evidence will not require unfavorable action on an application. On the contrary, we will grant or deny the applications on the basis of all the facts before us. Any applicant against which evidence of violations is produced may be assured that we will be receptive of any showing that it may make which will indicate that under all the circumstances we should accord little or no weight to the evidence of violations, or that there are overbalancing considerations of public interest. However, in the interest of conducting a comprehensive and objective investigation into all pertinent facts, the Board would not be justified at this time in issuing the directive that these applicants request, and the motions will to this extent be denied."

Subsequently, in the Board's "Notice of Hearing",[19] it was stated:

"B. With respect to disposition of the individual carrier applications, certain additional issues are presented, as follows:

"1. * * *

* * * * *

[19] August 12, 1952.

"b. Whether the particular applicant is fit, willing and able to perform properly the transportation covered by the respective application, and to conform to the provisions of the Civil Aeronautics Act and the rules, regulations and requirements of the Board thereunder."

Petitioners admit that "the parties were informed that evidence of violations would be considered in this proceeding" but claim they had no notice that past violations would be "tried and determined". This admission would appears to be dispositive. The fact of violations was merely evidentiary, a basis for an inference as to future conduct. No sanctions were imposed as a result of the findings, and the issue was "tried and determined" only in the sense that it was established as an evidentiary fact. We are not faced with the question whether the notice given here would be sufficient in a proceeding brought to revoke a license.

It is true that petitioners had "business and investment" property of which they could not be deprived without due process of law.[20] We think due process was satisfied here. Petitioners had notice that evidence of violations would be considered, and they had opportunity to put in direct evidence, to cross-examine, and to present rebuttal evidence. A second bite, so to speak, by way of a reopening of the record, is not an element of due process.

III

Petitioners' third contention is also based upon Section 9(b) of the Administrative Procedure Act. That section provides:

"In any case in which the licensee has, in accordance with agency rules, made timely and sufficient applica-

[20] Standard Airlines v. Civil Aeronautics Board, 85 U.S. App. D.C. 29, 177 F. 2d 18 (D.C. Cir. 1949).

> tion for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

They claim that, because the interim exemption and their applications for permanent authority covered both domestic and foreign-and-overseas operations, the Board could not terminate their domestic authority until it finally disposed of the entire application.

Under Section 801 of the Federal Aviation Act of 1958[21] the issuance of a certificate for foreign or overseas air transportation is subject to the approval of the President, and copies of all applications for such certificates must be transmitted to him before hearing thereon. In the order now being reviewed the Board stated that it was not deciding the question of authorizations for foreign and overseas supplemental service, "for no decision will be issued by the Board on this question until it is acted upon by the President." We think the applications were clearly severable. The Board is empowered to make "final" dispositions of applications for domestic service. It cannot do so as to overseas and foreign service until and unless the President approves. Merely because the requests for authorizations for these two types of operation were included in the same application and combined for consideration by the Board, the decision on domestic authority is no less "final".

We are now advised[22] that the President, on January 9, 1961, approved the several denials of authority for overseas service as to which the Board had recommended denials. Thus the major premise of these carriers' argument on this point would seem to have been removed.

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[21] 72 STAT. 782, 49 U.S.C. § 1461.

[22] C.A.B. Order No. E-16277 (Jan. 17, 1961).

IV

The fourth argument put forth by these carriers is that the Board denied their applications for exemptions because it decided to issue certificates. Because this court held that the Board erred in issuing certificates, and because they were not found unqualified for exemptions, they say these cases should be remanded so that the Board can reconsider its decision in light of our opinion in *United Air Lines, Inc.* v. *Civil Aeronautics Board*.[23] This argument is without merit. The *Large Irregular Air Carrier Investigation* had three main purposes: to determine the nature of the service to be rendered, to determine which of the applicants were qualified to perform this service, and to determine the form of the operating authority. The Board's decisions on the latter two aspects of the investigation were not interdependent. The nature of the service was decided, for all practical purposes, in Order No. E-9744 and approved by this court.[24] Order No. E-13436, now before us, is concerned primarily with the qualifications of the applicants and the form of the authority. These carriers were found unqualified for *any* authority, and the Board's decision on the form of the authorization is unrelated to this.

V

We come now to the separate contentions made by some of petitioners, to which we made earlier brief mention. Central Air Transport, Inc., argues that the Board failed to apply to it the same standards it had applied to other carriers found qualified. Central was found to lack compliance disposition because it had violated Section 408 of the Act by permitting another carrier to acquire control of its operations without Board approval. Although other

[23] *Supra* note 5.

[24] American Airlines v. Civil Aeronautics Board, *supra* note 17.

carriers were found to have engaged in similar conduct, there are factual distinctions that make the Board's treatment of this petitioner reasonable. Central's violations were flagrant, deliberate and recurrent, covering almost three years. Moreover the management of Central remained the same throughout the period of illegal operations and thereafter, while in the cases of Paul Mantz and Modern Air Transport there had been significant changes in management after the violations ceased. These differences become crucial when it is remembered that the findings of violations themselves served only as a basis for an inference as to future conduct. Where the character of the illegal conduct or the attendant circumstances suggest that the carrier will be disposed to comply in the future, reasonable distinctions can be made.

Currey Air Transport, Ltd., contends that the Board committed prejudicial error in refusing its request to issue *subpoenas ad testificandum* to four Civil Aeronautics Board employees who had examined Currey's books and records shortly before the hearing. We think there was no prejudicial error. The Board's decision with respect to Currey was clearly based on the sole ground that the carrier had committed willful and serious violations. The testimony that Currey sought to elicit from these Board employees related to methods of accounting and reporting and the carrier's organizational structure and financial condition. Direct evidence of these facts would certainly have a bearing on Currey's qualifications; it was available to Currey, of course, being its own records. What Currey sought was to have employees of the Board confirm this factual data, and possibly also confirm Currey's qualifications in these respects. But the Board's decision was based on grounds wholly different from those to which this evidence would have related. If Currey believed that by putting in favorable evidence relating to its organizational structure and financial stability it could overcome unfavorable inferences as to compliance

that might be drawn from its past conduct, it was free to do so. It was not deprived of this opportunity merely because the Board refused to compel testimony from its own employees. Currey was not prejudiced in the end result by this refusal. Currey cites *National Labor Relations Board* v. *Burns*[25] and *Donnelly Garment Co.* v. *National Labor Relations Board*[26] in support of its position, but these cases are inapposite. There the trial examiners had refused to *admit* evidence that was clearly material to the issues in dispute; here there was no such refusal.

Air Cargo Express was found unqualified for lack of compliance disposition because its owners and managers constituted all but one of a group of men who had owned and controlled Air Transport Associates, Inc., when the latter's operating authority was revoker in an enforcement proceeding. Air Cargo itself was not found to have committed any violations. In a petition to the Board for reconsideration and reopening of the record, the carrier alleged that there had been substantial changes in its ownership and management subsequent to the Examiner's initial decision. The Board denied the petition on the grounds that an applicant cannot escape the effects of an adverse finding "by conveniently arranged transfers of this type."[27] It said there had been no "fundamental change going to the heart of petitioner's qualifications". We think the Board should have granted an opportunity for the petitioner to supplement the record by evidence in support of its allegations. It appears that there was a complete change in the officers and directors of Air Cargo and that only 40 per cent of the carrier's stock is owned by former owners of Air Transport Associates. Of course a carrier found unquali-

[25] 207 F. 2d 434 (8th Cir. 1953).

[26] 123 F. 2d 215 (8th Cir. 1941).

[27] C.A.B. Order No. E-14449 (Sept. 15, 1959).

fied because of the character of its owners and managers cannot avoid the effects of such a finding by mere paper changes, but a good faith attempt to remedy the cause for disqualification should be respected. Air Cargo must be given an opportunity to establish its qualifications under the changed circumstances alleged. This part of the Board's order will be set aside, and No. 15042 will be remanded for further proceedings consistent with this opinion.

The order of the Board, in so far as it is here under attack is Nos. 15015 and 15026, is affirmed.

Air Transport Associates, Inc., petitioner in No. 15039, failed and refused to file a brief or to participate in the preparation and filing of briefs on behalf of the other petitioners, as directed by the prehearing order entered by the court in this matter, and its petition will therefore be dismissed. Continental Charters, Inc., petitioner in No. 15041, not having submitted a brief, orally stated it would abide the action of the court with respect to Air Transport Associates, Inc., and accordingly its petition will also be dismissed.

So ordered.

FAHY, *Circuit Judge, concurring in part, dissenting in part:* Petitioners, as large irregular carriers, are engaged in foreign and domestic supplemental air service. Their domestic service is involved in their petition for review. Petitioners have been operating by permission of respondent Board. The permission was initially in the form of temporary exemptions granted under section 416 of the Act. These exemptions authorized irregular operations without certification of the carriers under provisions of the Act governing "regular" operations. Later, petitioners continued to operate under "letters of registration," and still later they were required to and did file applications for individual exemptions, their operating authority to be continued, if

such applications were timely filed, under prior letters of registration until disposition of the applications. There was still another change in status in respects not material to the questions now presented. By whatever name their operating authority may be called the fact is that petitioners since 1946 have been operating as large irregular carriers with the permission and under the authority of the Board. Accordingly, they were licensees as the term "license" is defined in section 2(e) of the Administrative Procedure Act.[1] Nevertheless, their permission to operate domestically has been terminated by the order under review. This is so whether the order is considered as a revocation of their licenses, a denial of applications for new licenses, or a refusal to renew present operating authority. The essence of the matter, both procedurally and substantively, is that petitioners' licenses have been terminated. The question is whether this has been accomplished in a valid manner.

What eventuated was a proceeding under the rule-making provisions of the Administrative Procedure Act. The declared purpose of this investigative proceeding was to determine, first, whether the irregular type of air carrier operations was in the public interest and, if so, secondly, which of the carriers engaged in such operations should be authorized to continue, and under what type of operating authority. The Board found, first, that the continuation of supplemental irregular operations was in the public interest and, secondly, that petitioners, due to

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[1] This provision reads as follows:

> Sec. 2(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification or conditioning of a license.

60 Stat. 238 (1946), 5 U.S.C. § 1001(e) (1958).

past violations of the Act, would not be authorized to continue their operations.[2]

I think the licenses have not been validly terminated. The reasons assigned by the Board were past violations of the Act which had not been specified in any notice given to petitioners prior to Board action based on the violations found. No one could well contend that a person could be validly tried upon a general charge of violation of law, notwithstanding after the evidence was in some specific law or laws should be found to have been violated. Of course these proceedings were not a trial for an offense, but the analogy is instructive. Petitioners were advised that the investigation would determine which carriers would be permitted to continue in operation if irregular operations were found to be in the public interest, and that previous violations of the Act would be considered; but no notice was given of specific violations alleged or to be relied upon. What happened was that on all the evidence it was found that certain violations, previously unspecified, had occurred. The examiners first specified these violations in their decision. The Board, I think incorrectly, then refused to reopen the record, taking the position that the hearing had been adequate.

If the proceedings are considered as having been focused on applications for new operating authority, petitioners

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[2] The Board also decided that the carriers it found qualified to continue the irregular type of service should be certificated, a decision reversed by this court in *United Air Lines, Inc.* v. *Civil Aeronautics Board*, ... U.S. App. D.C. ...., 278 F. 2d 446. On October 24, 1960, the Supreme Court vacated our judgment in the following terms:

> The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86-661 [Act of July 14, 1960, 74 Stat. 527] has expired.

364 U.S. 297.

urge that the basis for the adverse action is unwarranted since their existing licenses were cancelled because they were found unqualified for such new authority; and if the proceedings are considered as directed to revocation of existing authority; the revocation requirements of neither the Administrative Procedure Act nor of due process of law were met.

As to the Administrative Procedure Act, section 9(b) provides:

> Except in cases of willfulness or those in which public health, interest or safety requires otherwise, no withdrawal, suspension, revocation or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

The Board contends that since the violations were willful petitioners cannot complain of Board failure to comply with this provision. But the Board did not revoke on the theory of willful violations which would dispense with the need of affording opportunity to comply as specified in section 9(b); the Board found willfulness only after the hearing had been held. In such a proceeding it seems to me the type of procedure required by section 9(b) for non-willful violations is necessary to support a revocation of a license. To revoke on the basis of violations, never previously specified, found on evidence of a general character taken in the course of the investigation, is inconsistent with the plain purport, if not the specific language, of section 9(b).[3]

[3] The opinion of the majority refers to the language in the legislative history that section 9(b) was not intended to apply to "temporary licenses which may be issued pending the determination of

And as to due process, I reach the same conclusion as with respect to section 9(b); that is, the hearing should in any event have been reopened when requested after the specific violations set forth as a possible basis for revocation were first made known by the examiners' decision.

The views above expressed I think are consistent with the decision of this court in *Standard Airlines, Inc.* v. *Civil Aeronautics Board*, 85 U.S. App. D.C. 29, 177 F.2d 18, and I think are not rendered untenable by *Cook Cleland Catalina Airways, Inc.* v. *Civil Aeronautics Board*, 90 U.S. App. D.C. 220, 195 F.2d 206, or *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 87 U.S. App. D.C. 331, 185 F.2d 426, vacated as moot, 341 U.S. 901. In *Cook Cleland* it was said no hearing was required by the Constitution as no existing business and no existing property was involved. What was said with respect to revocation of a license I think must be limited to the factual situation there before the Court. In *Eastern Airlines* the question was simply whether a hearing was essential to the grant of an exemption under section 416.

I concur in the majority opinion insofar as it sets aside the order of the Board with respect to petitioner Air Cargo Express.

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applications for licenses" and states that these were unquestionably temporary licenses, pointing to the fact that since 1938 authority by way of exemptions and letters of registration was carefully conditioned by the Board. Such authority as was granted to these carriers, along with the length of time the authority was enjoyed, does not seem comparable to temporary licenses issued pending determination of applications for licenses, especially in light of the language of section 9(b) actually adopted by Congress.